APPELLANT PRO SE:

TODD ANTHONY BEBOUT
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ATTORNEYS FOR APPELLEE:

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IN THE COURT OF APPEALS OF INDIANA

TODD A. BEBOUT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A05-0604-CR-191
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0503-FB-31

September 27, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Todd A. Bebout appeals the denial of his pro se petition for permission to file a belated notice of appeal and for appointment of counsel at county expense. We reverse and remand.

Issue

We find the following issue dispositive: Whether the trial court erred in denying Bebout's petition for permission to file a belated notice of appeal.

Facts and Procedural History

On March 15, 2005, Bebout consumed alcoholic beverages, marijuana, and cocaine. Subsequently, while driving his motorcycle, he caused an accident that killed Carol Waddel and injured her daughter, L.W. On March 23, 2005, the State charged Bebout with twelve counts based on the accident. On May 16, 2005, the State filed a habitual offender enhancement. On July 11, 2005, Bebout pled guilty to the following: Count I, class B felony operating a vehicle with a BAC of over .15 causing death; Count II, class B felony operating a vehicle with a controlled substance or its metabolites in the blood causing death; Count VI, class D felony operating a vehicle while intoxicated causing serious bodily injury; and Count XIII, a habitual offender enhancement. The plea agreement provided that sentencing for Counts I and II would run concurrently, but otherwise sentencing was left open to the discretion of the trial court. Magistrate Robert J. Schmoll presided over the guilty plea hearing. Magistrate Schmoll explained to Bebout that by pleading guilty Bebout was giving up his right to a jury trial and, were he to be found guilty, his right to appeal his conviction.

Thereafter the following colloquy occurred:

> Magistrate Schmoll: And Mr. Bebout, as I explained to you a few moments ago that by pleading guilty you'd give up your right to appeal your conviction. Do you understand, sir, that since this is an open plea, normally you would have the right to appeal any sentence that was entered?
>
> Bebout: Yes, sir.
>
> Magistrate Schmoll: And do you understand that by pleading guilty, you'd be giving up that right also?
>
> Bebout: Yes, sir.

Tr. at 11.

On July 28, 2005, the trial court held a sentencing hearing. After entering judgment of conviction, the trial court merged Counts I and II and sentenced Bebout to twenty years on Count II, three years on Count IV, and thirty years for the habitual offender enhancement to be served consecutively for an aggregate sentence of fifty-three years. The prosecutor then asked the trial court whether Bebout should be advised of his appellate rights regarding his sentence. The trial court responded that Bebout should have been advised of those rights during the guilty plea hearing. The transcript does not otherwise show any discussion of Bebout's right to appeal his sentence.

On December 12, 2005, Bebout filed a pro se verified petition for permission to file a belated notice of appeal for appointment of counsel at county expense. His petition included the following grounds for appeal:

> 3. The sentencing under the plea agreement was left open for the Court to decide.
>
> 4. At the time of sentencing, the Court informed Bebout that he had the right to a direct appeal relating to the sentence imposed by the Court and

advised Bebout's attorney, Mitchell Hicks, that [sic] of a telephone number to call to appeal Bebout's case.

5. Attorney Hicks was court-appointed and did not explain to Bebout the procedures he would need to follow in order to appeal the sentence imposed in this case.

6. When Bebout questioned Attorney Hicks regarding his right to appeal, Attorney Hicks told Bebout that a sentencing appeal was no big thing.

7. At the time Bebout was sentenced, he was suffering from severe depression and on medication, specifically Zoloft, Lithium, and Vistaril, which affected his understanding of the Court's explanation of his right to appeal the sentence imposed in this matter.

….

11. That any failure to file a timely notice of appeal was not due to Bebout's fault because the procedures to appeal the Court's sentence by way of a direct appeal at the time sentence was imposed herein was not explained to him by the Court or Attorney Hicks.

….

13. Pursuant to Ind. Criminal Rule 10, Bebout incorporates and makes a part hereof by reference, the July 28, 2005, guilty plea and sentencing hearing proceedings.

14. Bebout represents that he has been diligent in requesting permission to file a belated notice of appeal under Ind. P.C. Rule 2, § 1.

Appellant's App. at 75-77. On January 18, 2006, the trial court denied Bebout's petition for permission to file a belated notice of appeal and for appointment of counsel at county expense stating, "[Bebout] was advised at the guilty plea on July 11, 2005 that he was waiving his conviction and sentencing by accepting a plea agreement offered by the State." *Id*. at 84. Bebout appeals.

Discussion and Decision

Bebout contends that the trial court erred in denying his petition for permission to file a belated notice of appeal. Indiana Post-Conviction Rule 2 permits a defendant to seek permission to file a belated notice of appeal. This rule provides in part:

> Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:
>
> (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
>
> (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

Ind. Post-Conviction Rule 2(1).

Permission to file a belated notice of appeal may be granted only where the defendant is without fault in the delay of filing the notice of appeal. *Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). However, there are no set standards defining delay, and each case must be decided on its own facts. *Id*. To determine whether the defendant is without fault, the following factors are relevant: the defendant's level of awareness of his or her procedural remedy, age, education, familiarity with the legal system, whether he or she was informed of his or her appellate rights, and whether he or she committed an act or omission that contributed to the delay. *Id.* Whether a defendant is responsible for the delay is generally a matter for the trial court's discretion. *Id.* However, where a trial court fails to hold a hearing before denying a petition requesting permission to file a belated notice of appeal, we owe no deference to the trial court's ruling, and our review is de novo. *Id*.

Initially, we note that "the proper procedure for an individual who has pled guilty in an open plea to challenge the sentence imposed is to file a direct appeal or, if the time for filing a direct appeal has run, to file an appeal under P-C. R. 2." *Collins v. State*, 817 N.E.2d 230, 233 (Ind. 2004). Thus, Bebout's petition for permission to file a belated appeal was the proper method by which to challenge his sentence.

In this unusual case, Bebout stated in his petition that the sentencing court informed him that he had the right to a direct appeal relating to his sentence. Yet, the record before us fails to confirm whether the sentencing court actually provided him with that information. Further, the State concedes that at the guilty plea hearing, Bebout was *incorrectly* informed that by pleading guilty he was giving up his right to appeal his sentence. Appellee's Br. at 4. Inasmuch as Bebout's allegation that the sentencing court advised him that he could appeal his sentence is inconsistent with the information he received at the guilty plea hearing, the State argues that a hearing is necessary to determine whether and to what extent Bebout was advised of his appellate rights. Bebout argues that remand is unnecessary and requests reversal of the trial court's denial of his petition citing *Baysinger*, 835 N.E.2d 223, and *Hull v. State*, 839 N.E.2d 1250 (Ind. Ct. App. 2005).

In *Baysinger*, the defendant pled guilty in an open plea. Baysinger petitioned to file a belated notice of appeal, which the trail court denied. Baysinger appealed. The State argued that the trial court properly denied Baysinger's petition because the only evidence Baysinger offered in support of his petition was his own affidavit. In fact, Baysinger had included transcripts of his guilty plea and sentencing hearings as exhibits attached to his petition in addition to his affidavit. 835 N.E.2d at 225. At the guilty plea hearing, the trial court

informed Baysinger that "if you plead guilty, most, not all, but most of the reasons for appeal disappear after today." *Id*. We concluded that the failure to file a timely notice of appeal was not Baysinger's fault because the trial court had not sufficiently advised Baysinger of his right to appeal his sentence and Baysinger's trial counsel had not informed him of his right to appeal his sentence.

In *Hull*, on cross-appeal, the State asserted that the trial court erred in granting Hull's motion to file a belated notice of appeal. The State argued that Hull, by simply alleging in his motion that he was not informed of his right to appeal his sentence and that he had been diligent in seeking permission to file permission to file a belated notice of appeal, he had not met his burden of proving those allegations. In affirming the trial court, we concluded that

> Hull alleged in his motion that the trial court did not advise him of his appellate rights at the resentencing hearing and that he was diligent in pursuing his right to appeal the new sentence. The State does not dispute that Hull was not advised of his appellate rights at resentencing. As in *Baysinger*, we are unaware of any additional information that Hull could have provided in support of his motion.

839 N.E.2d at 1254.

Both *Baysinger* and *Hull* are distinguishable from the instant case. Here, Bebout stated in his petition for permission to file a belated notice of appeal that the sentencing court informed him that he had a right to appeal his sentence, which appears to be inconsistent with the record. Moreover, the State notes several additional statements in Bebout's petition inconsistent with the record that are relevant in determining whether Bebout is responsible for the delay in filing notice of appeal. For example, Bebout alleges that he was taking prescription medication for depression at the time of the sentencing hearing, but the record

shows that he told the sentencing court that he was not under the influence of drugs. Appellee's Br. at 5. Accordingly, we conclude that a hearing is necessary to determine whether the failure to file a timely notice of appeal was Bebout's fault. *But cf. Welches v. State*, 844 N.E.2d 559, 562 (Ind. Ct. App. 2006) (remanding for hearing on defendant's petition for permission to file a belated appeal where trial court did not rule on merits of defendant's petition because it erroneously concluded he had waived his right to appeal). We therefore reverse the trial court's denial of Bebout's petition for permission to file belated notice of appeal and remand for proceedings consistent with this opinion.

Bebout also argues that the trial court erred in denying his motion for appointment of a county public defender. The State concedes that because Bebout filed his petition pursuant to Post-Conviction Rule 2, the trial court could have appointed the county public defender to represent him. *See Kling v. State*, 837 N.E.2d 502, 508 (Ind. 2005) (stating that an open plea must be challenged by direct appeal and that an indigent person filing a such an appeal has the right to a county appellate public defender). However, the State notes that the record is silent as to whether Bebout's trial counsel continues to represent him. This question should also be resolved by the trial court on remand.

Reversed and remanded.

BAKER, J., and VAIDIK, J., concur.